Filed 3/8/11 Bragonier v. Wurster CA

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DON BRAGONIER et al.,

Plaintiffs/Cross-defendants and Respondents,

v.

THOMAS WURSTER et al.,

Defendants/Cross-complainants and Appellants.

F059172

(Super. Ct. No. 150775)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Donald J. Proietti, Judge.

Wild, Carter & Tipton and Steven E. Paganetti for Defendants/Cross-complainants and Appellants.

Canelo, Wilson, Wallace & Padro and Kenneth R. Mackie for Plaintiffs/Cross-defendants and Respondents.

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Defendants and cross-complainants appeal from a judgment entered after the trial court granted plaintiffs' and cross-defendants' motion for summary judgment. We reverse in part, finding summary judgment on the cross-complaint was improperly granted.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, Don and Kenra Bragonier (the Bragoniers), contracted to sell their business, Donjean Rug & Upholstery (Donjean), to defendants, Thomas, Deanna, and Trisha Wurster (the Wursters). The agreement included a stock purchase agreement, an earn out agreement, and a covenant not to compete (which contained a confidentiality provision), all of which were executed on February 28, 2003. The earn out agreement provided that the parties would "calculate the gross annual sales of the Company for the first twelve full months after Closing"; if sales exceeded a specified amount, the Wursters were to pay a percentage of the excess as additional consideration. On May 19, 2004, the parties executed a promissory note in which the Wursters promised to pay the additional earn out amount, approximately $173,000. On January 25, 2006, the parties executed Amendment Number One, which provided that the Wursters would make interest only payments on the promissory note for one year, then resume regular payments. The last payment the Wursters made on the promissory note was in August, 2006. At that time, a balance of $83,188.51 remained owing.

The Bragoniers filed a complaint alleging breach of contract and common counts against the Wursters. The Wursters answered with a general denial and an assertion of affirmative defenses including unclean hands, estoppel, and offset. The Wursters and Donjean cross-complained against the Bragoniers, asserting causes of action for breach of contract, intentional interference with prospective business advantage, and breach of the

covenant of good faith and fair dealing.[1] The Bragoniers filed a motion for summary judgment, seeking judgment in their favor on both their complaint and the cross-complaint. In opposition, the Wursters did not dispute the execution of the agreements or the balance due on the promissory note; rather, they presented facts in support of their affirmative defenses to the complaint. They asserted that, prior to the Wursters' purchase of Donjean, the Bragoniers made certain misrepresentations to them and concealed material information from them. Donjean and the Wursters used the same facts to try to demonstrate triable issues of material fact remained as to the cross-complaint. The trial court concluded the Bragoniers had met their burden of demonstrating the Wursters owed a balance on the promissory note; it found the Wursters had not produced credible evidence sufficient to raise a triable issue of material fact regarding their defenses to the complaint. Further, since Donjean's and the Wursters' opposition to the motion on the cross-complaint depended on the same facts, the trial court determined they had not raised a triable issue of fact in support of their causes of action. The court granted the Bragoniers' motion for summary judgment on both the complaint and the cross-complaint, judgment was entered, and the Wursters and Donjean appeal.

DISCUSSION

I. Complaint

A. Standard of review

A plaintiff may move for summary judgment if he contends there is no defense to the action. (Code of Civ. Proc., § 437c, subd. (a).)[2] The moving plaintiff may show there is no defense to the action by proving each element of the cause of action entitling

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[1] The third cause of action was captioned "False Promise Without Intent of Performing," but it alleged a breach of the implied covenant of good faith and fair dealing and the trial court and parties treated it as such.

[2] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

him to judgment on that cause of action. (§ 473c, subd. (p)(1).) He "bears an initial burden of production to make a prima facie showing" in support of the motion. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) The moving plaintiff need not disprove the affirmative defenses asserted by the defendant. (*Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co*. (2009) 170 Cal.App.4th 554, 562.) If the moving plaintiff "carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "The evidence of the party opposing the motion must be liberally construed, and that of the moving party strictly construed." (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 308.)

"As a summary judgment motion raises only questions of law regarding the construction and effect of supporting and opposing papers, this court independently applies the same three-step analysis required of the trial court. We identify issues framed by the pleadings; determine whether the moving party's showing established facts that negate the opponent's claim and justify a judgment in the moving party's favor; and if it does, we finally determine whether the opposition demonstrates the existence of a triable, material factual issue." (*Tsemetzin v. Coast Federal Savings & Loan Assn*. (1997) 57 Cal.App.4th 1334, 1342 (*Tsemetzin*).) The reviewing court examines the documents presented in the trial court and independently determines their effect as a matter of law. (*Id*. at p. 1341.) "Though summary judgment review is de novo, review is limited to issues adequately raised and supported in the appellant's brief. [Citations.] 'As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed.' [Citation.]" (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126.)

B. Plaintiffs' motion

The breach of contract cause of action of the complaint alleges the parties entered into an earn out agreement, a promissory note, and an amendment, which collectively comprise the contract sued on; the Wursters breached the contract on or about October 1, 2006, by failing to make payment when due. As a proximate result, the Bragoniers were damaged by the loss of $89,504.58 plus interest from August 31, 2007. The common counts allege the Wursters became indebted to the Bragoniers on an open book account, on an account stated, and for work, labor, services, and materials rendered at the Wursters' request; the reasonable value due and unpaid was $89,504.58 plus interest.

In support of their motion for summary judgment, the Bragoniers presented facts they contended were undisputed: the Wursters consented to the terms of the earn out agreement, the promissory note, the amendment, and a stock purchase agreement; in August 2006, the Wursters owed a balance of $83,188.51; and the Wursters made no payments after August 2006.

Although the Bragoniers submitted evidence in support of these facts, it was not accompanied by any declaration authenticating the documents submitted. "A motion for summary judgment must be decided on admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice may be taken." (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119-1120 (*Guthrey*); § 437c, subd. (b)(1).) Documents must be authenticated before they are admissible. (Evid. Code, § 1401.) The Wursters did not object to the lack of authentication, however. Objections must be made either in writing, and served and filed along with the objecting party's opposition or reply papers, or at the hearing on the record; if not, they are deemed waived. (§ 437c, subd. (b)(5); Cal. Rules of Court, rules 3.1352, 3.1354.) Consequently, any objection to the lack of authentication of the Bragoniers' evidence was waived, and the evidence may be relied upon in determining the motion. (§ 437c, subd. (b)(5), (c), (d); *Weil v. Federal Kemper Life Assurance Co*.

(1994) 7 Cal.4th 125, 149, 160, fn. 9 (*Weil*).) The Bragoniers submitted sufficient evidence to meet their initial burden of producing evidence to make a prima facie showing in support of the motion and to shift to defendants the burden of producing evidence making a prima facie showing of the existence of a triable issue of material fact.

C. Defendants' showing

In response to the Bragoniers' statement of undisputed facts, the Wursters admitted they made no payments after August 2006. They did not dispute that they entered into the agreements or that the balance remaining in August 2006 was as stated by the Bragoniers. Instead, the Wursters asserted the defenses of unclean hands, estoppel, and offset, contending they were induced to execute the agreements by the Bragoniers' misrepresentations.

> "The defense of unclean hands arises from the maxim, '"'He who comes into Equity must come with clean hands.'"' [Citation.] The doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim. [Citations.] The defense is available in legal as well as equitable actions. [Citations.] Whether the doctrine of unclean hands applies is a question of fact. [Citation.] [¶] … [¶]
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> "Not every wrongful act constitutes unclean hands. But, the misconduct need not be a crime or an actionable tort. Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine." (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978-979.)

The unclean hands defense in the Wursters' answer alleged the Bragoniers fraudulently induced the Wursters to execute the earn out agreement "by falsely misrepresenting and concealing the facts at least 285,000 was work in progress and should have been included in the 2002 sales information provided" to the Wursters before they executed the agreement; the Wursters would not have entered into the agreement if they had known the true facts, and the Bragoniers are therefore barred from any recovery.

Equitable estoppel is defined as follows: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (Evid. Code, § 623; *San Diego Muni. Credit Union v. Smith* (1986) 176 Cal.App.3d 919, 922-923.) "The doctrine is defensive in nature only, and 'operates to prevent one [party] from taking an unfair advantage of another.' [Citation.]" (Id. at p. 923.) The elements of equitable estoppel are: "(1) a representation or concealment of material facts (2) made with knowledge, actual or virtual, of the facts, (3) to a party ignorant, actually and permissibly, of the truth, (4) with the intent, actual or virtual, that the latter act upon it, and (5) the party must have been induced to act upon it. [Citation.]" (*Ibid*.) The estoppel defense alleged the Bragoniers' "conduct and activities with respect to the subject of this litigation" estopped them from asserting any claims for damages or other relief against the Wursters.

Section 431.70 provides in pertinent part: "Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations." This section "permits a defendant in a civil action to assert a claim for relief in its answer and allege, in effect, that the defense claim constituted prior payment for the plaintiff's claim and therefore should be set off against any award in the plaintiff's favor." (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co*. (2002) 29 Cal.4th 189, 192.) The Wursters' offset defense alleged the Bragoniers violated a covenant not to compete and interfered with the Wursters' potential sale of the business, and the resulting damage should offset any amount due to the Bragoniers. In their opposition to the motion for summary judgment, however, the Wursters argued they were

entitled to an offset based on the same claim of misrepresentation of the value of the business that was asserted as the basis for the other defenses.

In their opposition to the motion for summary judgment, the Wursters asserted Don "reported to Wurster that there was over $285,000.00 of work in progress that would be part of the total accounts receivable in conjunction with the sale of Donjean." Further, the Wursters asserted the Bragoniers provided them with a list of Donjean's top 25 customers, which included CSAA, an insurance company, as the largest customer; the Bragoniers knew CSAA's contract with Donjean would terminate upon sale of the company, but did not disclose that information prior to the sale and the execution of the earn out agreement and promissory note. CSAA terminated its contract with Donjean after the sale. The Wursters would not have entered into the purchase agreement, including the earn out agreement and promissory note, if they had known the true facts.

In support of these asserted facts, the Wursters cited certain deposition testimony of Kenra and the declaration of Thomas.[3] Thomas's declaration states that, while he was considering purchasing Donjean, the Bragoniers gave him financial information and a list of Donjean's customers. Don told him "there was over $285,000 of work in progress that would be part of the total accounts receivable in conjunction with the sale of Donjean." Don also represented CSAA would remain a client after the Wursters' purchase of the business. Thomas relied on this information as a basis for purchasing Donjean and recommending to Trisha and Deanna that they participate in the purchase. After the purchase, Thomas learned the $285,000 of work in progress did not exist and CSAA would not be renewing its contract with Donjean. This was material information and, if he had known it, he would not have purchased the business or executed the earn out agreement and promissory note.

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3 The parties are referred to individually by their first names because some of them share a last name. We do this for clarity and convenience and intend no disrespect to the parties.

In the portion of her deposition cited by defendants, Kenra stated she could not recall whether or not she talked to Thomas about the top 25 customers before he purchased the business; she gave him a list of them, which showed CSAA as the top customer. Kenra understood the customer list was an important document for a prospective buyer, and she knew prior to the sale that the CSAA contract was not transferable to the new owner. She did not disclose to Thomas in those terms that the CSAA contract was not transferable on sale, but he knew because of a schedule attached to the stock purchase agreement, which listed the two companies whose contracts required consent. The CSAA contract terminated on transfer of ownership.

In its ruling on the motion for summary judgment on the complaint, after describing the evidence offered by the Bragoniers in support of their motion and the evidence offered by the Wursters in opposition, the trial court concluded the Wursters' evidence did not raise a triable issue of material fact. It found the cited portions of Kenra's deposition did not support the Wursters' claims. It concluded the Bragoniers' documentary evidence showed the "work in progress amounts were clearly disclosed to Defendants," the stock purchase agreement permitted the Wursters access to Donjean's books and records, and the stock purchase agreement "clearly lists CSAA as a contract requiring consent and approval after the sale of the business." The court's ruling did not mention Thomas's declaration.

"Supporting or opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. Any objections based on the failure to comply with the requirements of this subdivision shall be made at the hearing or shall be deemed waived." (§ 437c, subd. (d).) In ruling on a motion for summary judgment, the court must "consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court." (§ 437c, subd. (c); *Weil, supra*, 7 Cal.4th at p. 149, fn. 9.) Neither party filed

written objections to any evidence presented by the other party, nor did they raise an objection at the hearing or ask for a ruling on any objection.[4] The trial court's ruling recited that the court "considered all the evidence set forth in the papers submitted, and inferences reasonably deducible therefrom, except that to which objection was sustained." Because no objections were made, the trial court did not sustain any objections to the evidence presented.

The aim of the summary judgment procedure is to determine, through the media of affidavits and other documentary evidence, "whether the parties possess evidence requiring the weighing procedures of a trial." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20.) "For practical purposes, an issue of *material* fact is one which, in the context and circumstances of the case, 'warrants the time and cost of factfinding by trial. . . .' [Citation.]" (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162 (*Sangster*).) Evidence raises a triable issue of material fact "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.) Substantial responsive evidence is required; "responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact." (*Sangster, supra,* 68 Cal.App.4th at p. 163.)

The Bragoniers sued to recover the balance due on the promissory note. Their evidence established that the parties entered into the earn out agreement, executed on February 28, 2003, which provided the Wursters would pay the Bragoniers an additional amount if the gross annual sales of the business during the first year after its sale to the

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4 The parties included in their separate statements purported objections to the other parties' statements of fact. Evidentiary objections, however, must be made to specific evidence. California Rules of Court, rule 3.1354, requires written evidentiary objections to be made in a separate document, and contain specific information. Neither side filed such a document.

Wursters exceeded a specified amount. In keeping with that agreement, the parties executed a promissory note on May 19, 2004, more than one year after the sale of the business to the Wursters, in which the Wursters promised to pay the Bragoniers a specific amount, presumably calculated as provided in the earn out agreement. The Wursters did not deny that they executed these agreements, but asserted they were induced to do so by the Bragoniers' misrepresentations.

Thomas's declaration in opposition to the motion stated that, when he was considering purchasing Donjean, the Bragoniers gave him the customer list, which showed CSAA as the largest customer; Don represented CSAA would remain a customer after sale of the business. After the purchase, Thomas learned CSAA would not be renewing its contract with Donjean. He would not have purchased the business or executed the earn out agreement or promissory note if he had known CSAA would be lost as a client.

Thomas's declaration is studiously vague. It does not state when Don made the representation that CSAA would remain a customer, when Thomas learned it was not true, or when or why CSAA did not renew its contract with Donjean. Kenra stated in her deposition testimony, on which the Wursters' opposition relied, that CSAA's contract terminated on sale of the business. Notably, Thomas does not state either that CSAA was no longer a customer, or that it was still a customer as represented, at the time the Wursters signed the promissory note more than a year after the Wursters' purchase of Donjean. Further, Thomas's declaration does not address the provisions of the stock purchase agreement. Paragraph 4.12 of the agreement provides: "None of the execution and delivery by Seller of this Agreement, the consummation by Seller of the transactions contemplated hereby and thereby, or compliance by Seller with any of the provisions hereof or thereof will … (ii) except as set forth on Schedule 4.12 hereto, conflict with, violate, result in the breach or termination of, … any … agreement or other instrument or obligation to which Company is a party." Schedule 4.12 of the stock purchase agreement

listed the CSAA contract as one requiring consent. Thus, the purchase contract itself gave notice that the CSAA contract would not simply continue, unaffected by the sale. Finally, the Wursters presented no evidence either Deanna or Trisha knew about, or relied on, Don's alleged misrepresentation when she signed either the earn out agreement or the promissory note.

Thomas's declaration also asserts Don told Thomas there was over $285,000 of work in progress, and Thomas relied on that representation in purchasing Donjean, but later discovered it was not true. He stated the representation affected the value to him of the company. Thomas does not state when the representation was made, as of what date the work in progress amount was reportedly $285,000, that the figure was inaccurate on that date, or when he discovered the representation was not true. The stock purchase agreement provides:

> "The accounts receivable and work in progress less reserves therefor as shown on the books of the Company as of Closing are referred to herein as the 'Closing Amount.' In the event the Company has not collected accounts receivable and work in progress in an aggregate amount not less than the Closing Amount within six months after the Closing Date, then Company shall assign any such uncollected accounts receivable or accounts receivable derived from the work in progress as of Closing to the Seller and the Buyer and Seller shall direct [the attorneys holding funds in escrow] to pay the difference between the Closing Amount and the actual amount of accounts receivable and work in progress collected by Company to Buyer from the Escrowed Funds."

"Closing" was defined in the stock purchase agreement dated as of February 28, 2003. At closing, the Bragoniers were required to deliver to the Wursters the papers and records of the company. Thomas does not state that Don's alleged misrepresentation was made at closing; he does not assert he was not advised, or was misadvised, of the closing amount of accounts receivable or work in progress at closing. He does not state what the closing amount of work in progress was. He does not state that the books and records of the company were not delivered as required, or that he remained unaware, when he

signed the promissory note more than a year after the Wursters took ownership and control of the company, of the true amount of work in progress that existed at the time of purchase.

Thomas's declaration did not provide sufficient evidence to raise a triable issue of fact regarding whether the Bragoniers made material misrepresentations to the Wursters, or concealed information from them, whether the Wursters reasonably relied on the representations, or the absence of the concealed information, at the time they signed the promissory note on which the Bragoniers' action is based, or whether the Wursters were unaware of the true facts at the time they executed the promissory note. The evidence was not sufficient to allow a reasonable trier of fact to find in favor of the Wursters on those factual issues. Consequently, we find the trial court did not err in granting the Bragoniers' motion for summary judgment on their complaint.

II. Cross-complaint

A. Standard of review

The Bragoniers, as cross-defendants, moved for summary judgment on the cross-complaint. A cross-defendant moving for summary judgment "has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the … cross-defendant has met that burden, the burden shifts to the … cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (§ 437c, subd. (p)(2).) We independently review the trial court's ruling on the motion. (*Tsemetzin, supra,* 57 Cal.App.4th at p. 1342)

B. Cross-defendants' motion

The first cause of action of the cross-complaint, for breach of contract, alleged the parties entered into a covenant not to compete, which included a confidentiality provision prohibiting disclosure of Donjean's confidential information, including financial

information not generally known to the public. It alleged the Bragoniers breached the confidentiality provision by disclosing financial and other confidential information to Taylor Renovations, Coit Restoration, Luis Gutierrez, Restoration Management and County Bank, damaging the business and disrupting the Wursters' and Donjean's business relationship with County Bank. The second cause of action was for intentional interference with prospective business advantage. It alleged the Wursters had a buyer for the business or its assets, and the Bragoniers interfered with the sale by telling Taylor Renovations, Coit Restoration, Luis Gutierrez, Restoration Management and County Bank negative information about Donjean's finances and business. As a result, the Wursters were unable to complete the sale. The third cause of action alleged a breach of the covenant of good faith and fair dealing implied into the covenant not to compete. It alleged the Bragoniers breached the covenant by disclosing financial information that was subject to the confidentiality agreement and by disclosing negative information about Donjean, thereby interfering with the Wursters' attempt to sell the business.

In support of their motion, the Bragoniers presented the declarations of Gary Taylor, principal owner of Taylor Renovations, Peter Baker, principal owner of Coit Renovation Services, and Luis Gutierrez. Taylor, Baker, and Gutierrez stated the Bragoniers did not disclose confidential information about Donjean to them and their decisions not to purchase Donjean were not influenced by the Bragoniers. The Bragoniers presented no evidence purporting to show they did not disclose confidential information about Donjean to anyone at Restoration Management.

Regarding disclosures to County Bank or disruption of Donjean's and the Wursters' business relationship with County Bank, the Bragoniers presented the following facts: the Bragoniers filed an unlawful detainer action against defendants on October 24, 2006; "[d]efendants contend that County Bank was informed of the Unlawful

Detainer action after October 24, 2006";[5] and "[d]efendants had an affirmative duty to inform County Bank of the removal of equipment from the premises of Don Jean."

The Bragoniers did not present facts establishing what information the Wursters and Donjean allege was improperly disclosed to County Bank or in what way their relationship with the bank was damaged by the Bragoniers' conduct. They did not show what specific claims the Wursters and Donjean were making, in order to show that those claims were without merit. The Bragoniers' statement of undisputed facts contained no facts or citation to supporting evidence showing the Bragoniers did not disclose confidential information to County Bank. It contained no facts or citation to supporting evidence showing the Bragoniers' conduct did not interfere with the Wursters' or Donjean's business relationship with County Bank.

Thus, the Bragoniers failed to carry their initial burden of showing that one or more elements of each cause of action of the cross-complaint cannot be established. Their motion for summary judgment on the cross-complaint should have been denied.[6]

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[5] We note that the evidence cited in support of this purported fact does not support it. The cited evidence concerns a conversation between Thomas and Don and does not mention any contention that County Bank was informed of the unlawful detainer action on any particular date or at all.

[6] The Bragoniers moved for an award of sanctions pursuant to section 907 and California Rules of Court, rule 8.276(a)(1) against the Wursters and Donjean, contending this appeal is frivolous. Because we find merit in the appeal, we deny the motion.

DISPOSITION

The judgment on the Bragoniers' complaint is affirmed. The judgment on the cross-complaint is reversed. The trial court is directed to vacate its order granting the Bragoniers' motion for summary judgment on the cross-complaint and to enter a new order denying that motion. The parties shall bear their own costs on appeal.

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HILL, P.J.

WE CONCUR:

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WISEMAN, J.

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POOCHIGIAN, J.